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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-602

KENNETH CARROL KINSER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District is reported at 291 So.2d 80 (Fla., 3rd DCA, 1974). The opinion is reproduced in the Appendix to the Petition for Certiorari at A 1-2.

JURISDICTION

The jurisdictional requisites are set forth in the Petition. However, respondent contests the fact that jurisdiction in this Honorable Court has been properly invoked inasmuch as based upon the following facts and authorities no substantial federal question has been made to appear.

QUESTION PRESENTED FOR REVIEW

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE OPINION BELOW WHICH HELD THAT THERE WAS NO VIOLATION OF PETITIONERS' CONSTITUTIONAL RIGHTS WHERE WAIVER OF TRIAL BY JURY WAS ANNOUNCED TO THE COURT BY

THE PETITIONER'S PRIVATELY RETAINED ATTORNEY, AND SUBSEQUENTLY THE PETITIONER HIMSELF SIGNED A WRITTEN WAIVER OF TRIAL BY JURY IN OPEN COURT WITH APPROVAL OF THE COURT AND THE CONSENT OF THE STATE?

HOW THE FEDERAL QUESTION WAS PRESENTED

The issue before this Court was first raised by the petitioner on direct appeal from his conviction. At that time through his assignment of error number 8 the defendant asserted that his waiver of trial by jury was not voluntarily executed nor was it an intelligent waiver of his constitutional rights. It should be noted that at no time did the defendant seek to withdraw his waiver before the trial judge nor did he seek to apprise the trial judge of any of the errors now asserted by means of a motion for new trial.

STATEMENT OF THE CASE AND FACTS

The Statement of the Case as set forth by the petitioner substantially reflects the proceedings in the court below. However, respondent takes

issue with the inclusion of petitioners Footnote number 6 attempting to set forth certain additional "facts which do not appear" in the record on appeal. These "facts" admittedly were obtained by counsel from several conversations which took place outside of the courtroom between the petitioner and his prior attorney. These "facts" have never been presented to any prior reviewing court, have no basis in any prior records of the instant cause and are now entirely improper in a petition for certiorari before this Honorable Court.

ARGUMENT

The threshold question for determination of petitioner's present challenge before this Court is whether the record developed on appeal in the state courts is adequate to support and fully explore the constitutional issues he seeks to raise. At least a major portion of the necessary facts in support of petitioner's cause are set forth by means of Footnote #6 to petitioner's Statement of the Case. It is admitted by the petitioner that the aforesaid facts do not appear in petitioner's record on appeal since these very same facts resulted not from development at any judicial proceeding but only from hearsay

conversation between counsel and the petitioner outside of court. It is incumbent on the petitioner to develop a record sufficient to support review. This he clearly has not done. This failing becomes even more glaring in light of the procedure provided by the Florida Rules of Criminal Procedure for development of post-conviction relief. Rule 3.850, Florida Rule of Criminal Procedure, is a direct counterpart to Section 2255 of Title 28 United States Code. The rule, promulgated by the Florida Supreme Court, was intended to provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack. See Roy v. Wainwright, 151 So.2d 825 (Fla. 1963). The rule provides for relief on any of four grounds: (1) that the sentence was imposed in violation of the constitution or laws of the United States or of the State of Florida, (2) that the sentencing court lacked jurisdiction, (3) that the sentence was in violation of the maximum authorized by law, or (4) that the sentence is otherwise subject to collateral attack. By vesting jurisdiction in the trial court, the original trial judge is empowered to conduct an evidentiary hearing and if necessary correct any error going to the validity of the judgment and sentence. State v. Wooden, 246 So.2d 755 (Fla., 1971).

Petitioner's total failure to explore any avenues of relief in the trial court has made it difficult if not impossible to accurately define the applicability of key constitutional issues to the facts of the instant case. As a result the record on appeal in this case is as yet undeveloped. Those facts which are necessary to shape out the skeleton of petitioner's constitutional challenge have been supplied not as a result of any hearing in the context of an adversary proceeding but rather in the form of suggestion by counsel in petitioner's Footnote #6.

At the least, the assertion of these additional facts raises the distinct possibility that counsel's decision to waive trial by jury may have been motivated by a deliberate choice of trial strategy. If indeed counsel had such purpose in mind in waiving trial by jury, the constitutional objection now raised would be clearly waived. As this court stated in Henry v. Mississippi, 379 U.S. 443, 451-452 (1965).

> "If [a strategic reason] motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding

> on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, See Whitus v. Balkom, 333 F.2d 496 (5th Cir., 1964), we think that the deliberate bypassing by counsel of the contemporaneous objection rule as a part of trial strategy would have that affect in this case."

Since no objection was ever made in the trial court either before or after trial that the waiver may not have been entirely knowing and voluntary the trial judge was never presented with an opportunity to explore the invalidity of the waiver. The United States Court of Appeals for the Fifth Circuit in United States v. Marcello, 423 F.2d 993, 1005 (5th Cir., 1970), citing to Henry, supra, has clearly held that an attorney's conscious waiver of a constitutional right in order to obtain a tactical

advantage for his client is then binding on the defendant. In accord is Yeloushan v. United States, 339 F.2d 533 (5th Cir., 1964), holding that a waiver bars direct appeal of the constitutional right to trial by jury in the district in which the crime was committed. See Murch v. Mottram, ____U.S.____, 93 S.Ct. 71 (1972).

Petitioner now suggests that he desired a trial by jury but was forced to accept his counsel's decision as to waiver of the jury. This suggestion is made for the first time before this Court. No challenge was made in the trial court and on appeal petitioner's only argument in his brief was that it was per se error for the trial judge not to inquire of the defendant at the time of his waiver of trial by jury. As a result, the instant record is now devoid of facts surrounding counsel's decision to waive the jury although such facts could have been brought out by hearing on a motion to vacate judgment and sentence pursuant to Rule 3.850 Fla. R.Cr. P. See Parks v. State, 263 So.2d 642 (Fla., 3rd DCA, 1972).

Petitioner now seeks to extend the reasoning of this Court's opinion in Boykin v. Alabama, 395 U.S. 238 (1969) to the instant case. Apart from the fact that Boykin was denied upon a silent record whereas in the case below the defendant executed a written waiver

of his right to a jury,* the fundamental difference between the cases is that Boykin was entering a plea of guilty, thereby admitting the ultimate issue of the trial and surrending nearly all constitutional protections. Kinser surrendered not nearly as much, his waiver going only so far as to select which trier of fact would sit at his trial. The comparison between the two situations is not compelling. Following this reasoning, Florida law provides that the execution of a written waiver of jury trial in open court by the defendant is sufficient by itself, and that the judge's failure to make further inquiry of the defendant is not grounds for reversal. Quartz v. State, 258 So.2d 283 (Fla., 3rd DCA, 1972), relying upon United States v. Hunt, 413 F.2d 983 (4th Cir., 1969) and Pool v. United States, 344 F.2d 943 (9th Cir., 1965).

* Although petitioner contends the stamped waiver form was so blurred as to be illegible, he admits in his Footnote#6 that defense counsel told petitioner he was going to waive trial by jury and petitioner "was told by his attorney what he was signing."

CONCLUSION

On the existing facts of the case at bar the federal question presented by petitioner is insubstantial. It is respectfully urged that this Court should deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondent in Opposition was served upon the HONORABLE PHILIP CARLTON, JR., Suite 217 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, this_____day of February, 1975.

WILLIAM L. ROGERS
Assistant Attorney General